TEH CHENG POH v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) April 27, 1979]

[Kuala Lumpur — Federal Court Criminal Appeal No. 46 of 1976]

Criminal Law and Procedure — Conviction of accused set aside and case remitted to Federal Court for further consideration — Emergency Regulations declared to be ultra vires by Privy Council — Regulations subsequently re-enacted by Act of Parliament with retrospective effect — Emergency Ordinance and Emergency Regulations validated — Retrial ordered.

Constitutional Law — Emergency regulations declared to be ultra vires — Emergency Ordinance and Regulations re-enacted by Act of Parliament with retrospective effect — Validity of — Emergency (Essential Powers) Act, 1979 (Act 216).

In this case the appellant had been charged with unlawful possession of a revolver and ammunition under the Internal Security Act, 1960. He was tried in accordance with the special procedure prescribed by the Essential (Security Cases) Regulations, 1975 (P.U.(a) 320/75 as amended by P.U.(A) 326/75). He was convicted and sentenced to death — see [1978] 1 M.L.J. 30 and 68. His appeal to the Federal Court was dismissed — see [1977] 2 M.L.J. 66. His appeal was however allowed by the Yang di-Pertuan Agong on the advice of the Judicial Committee of the Privy Council ([1979] 1 M.L.J. 50). The Privy Council held that the appellant was correctly charged but the Regulations under which he was tried was *ultra vires* the Federal Constitution and therefore his trial was a nullity. The conviction and sentence were set aside and the case remitted to the Federal Court for further consideration as to whether or not to order a new trial.

Held: (1) by virtue of the Emergency (Essential Powers) Act, 1979, the Essential (Security Cases) Regulations have been validated and with effect from the date they purported to come into force;

(2) the conviction and sentence of the appellant have been set aside by the Yang di-Pertuan Agong acting on the advice of the Privy Council and no longer exist. In the circumstances this was a proper case in which a retrial should be ordered.

Cases referred to:-

(1) *Teh Cheng Poh* v. *Public Prosecutor* [1977] 2 M.L.J. 66; [1979] 1 M.L.J. xvi.

(2) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

(3) *Cheah Yew Fatt & Anor.* v. *Public Prosecutor* [1960] M.L.J. xvi.

(4) *Chong Chee Pak* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 45.

(5) *Sau Soo Kim* v. *Public Prosecutor* [1975] 2 M.L.J. 134.

(6) *Fan Yew Teng* v. *Public Prosecutor* [1975] 2 M.L.J. 235.

(7) *Public Prosecutor* v. *Abdul Aziz* [1978] 2 M.L.J. 155.

(8) *Au Pui-Kuen* v. *Attorney-General* [1979] 2 W.L.R. 274.

(9) *Reid* v. *Queen* [1979] 2 W.L.R. 221.

(10) *Rai Ramkrishna* v. *State of Bihar* [1964] 1 S.C.R. 897.

(11) *Johnson Tan Hong Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66.

(The following cases were also cited: *In re Athlumne* [1898] 2 Q.B. 582, 601; *Young* v. *Adams* [1898] A.C. 469, 476; *Crane* v. *Director of Public Prosecutions* [1921] 2 A.C. 299, 321; *Anthony Kenneth Merry* [1970] 54 C.A.R. 274; *Loh Kooi Choon* v. *Public Prosecution* [1977] 2 M.L.J. 187; *Western Transport Pty. Ltd.* v. *Kropp* [1964] 3 All E.R. 722; *Osman* v. *Public Prosecution* [1968] 2 M.L.J. 137; *Government of Malaysia* v. *Zainal* [1977] 2 M.L.J. 254, 256; *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 16, 17).

FEDERAL COURT.

Karpal Singh for the appellant.

Datuk Abu Talib bin Osman (Solicitor-General) for the respondent.

Suffian L.P. (delivering the judgment of the Court): The accused was charged with unlawful possession in a security area of a revolver and ammunition under the Internal Security Act, 1960. He was tried in accordance not with the Criminal Procedure Code but with the special procedure prescribed by the Essential (Security Cases) Regulations, 1975, published as P.U.(A) 320/75 as amended by P.U.(A) 326/75 ("the regulations"). He was convicted and sentenced to death. His appeal was dismissed[1] by the Federal Court but allowed by His Majesty the Yang di-Pertuan Agong on the advice of the Privy Council.[2] The Privy Council held that the accused was correctly charged, but the regulations were *ultra vires* the constitution and therefore his trial was a nullity, and their Lordships advised that the conviction and sentence of the accused should be set aside and the case remitted to this court for further consideration as to whether or not to order a new trial.

The regulations came to be made in this way. As a result of the riots of May 13, 1969, His Majesty under Article 150(1) of the Constitution proclaimed an emergency on May 15, 1969, at a time when Parliament was not sitting.

On the same day His Majesty promulgated the Emergency (Essential Powers) Ordinance, 1969 ("the Ordinance"), published as P.U.(A) 146, purporting to give himself power to make regulations for certain purposes. He promulgated the Ordinance under Clause (2) of Article 150 of the Constitution.

Clause (2) of Article 150 of the Constitution provides:

"If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required."

After the Proclamation of the Emergency Parliament next sat on February 20, 1971.

Some time thereafter in 1975 in purported exercise of the power conferred by section 2 of the Ordinance His Majesty made the regulations under which the accused was tried and convicted. The Privy Council ruled that they were *ultra vires* on the ground that once Parliament had sat on February 20, 1971, His Majesty ceased to have power to make law.

In their judgment their Lordships said at page 53:

"There are only two sources from which the Yang di-Pertuan Agong as such can acquire power to make written law, . . .: one is by a provision of the Constitution itself; the other is by the grant to him of subordinate legislative power by an Act passed by the Parliament of Malaysia. . . . So far as his power to make written laws is derived from Article 150(2) of the Constitution itself . . . , it comes to an end as soon as Parliament first sits after the Proclamation of an Emergency; . . . . If it be thought expedient that after Parliament has first sat the Yang di-Pertuan Agong should continue to exercise a power to make written laws equivalent to that to which he was entitled during the previous period to exercise under Article 150(1) of the Constitution, the only source from which he could derive such powers would be an Act of Parliament delegating them to him."

Following this advice, Parliament at the instance of Government has enacted the Emergency (Essential Powers) Act, Act No. 216, published in the *Gazette* on January 25, 1979 ("the Act").

The question for our determination is whether or not we should order a retrial — Mr. Karpal Singh arguing on behalf of the accused that we should either make no order at all or alternatively that we should not order a retrial, and the learned Solicitor-General, on the other hand, arguing that since the conviction and sentence of the accused have been set aside we should out of respect to the judgment of the Privy Council order a retrial.

Mr. Karpal Singh's arguments were in two parts, as follows: —

First part

This court should make *no* order, the trial having been held a nullity. In support he cited the following cases: *Cheah Yew Fatt & Anor.* v. *Public Prosecutor,*[3] *Chong Chee Pak* v. *Public Prosecutor,*[4] *Sau Soo Kim* v. *Public Prosecutor,*[5] *Fan Yew Teng* v. *Public Prosecutor,*[6] and *Public Prosecutor* v. *Abdul Aziz.*[7]

Second part

Alternatively, if the court is minded to make an order rather than no order, it should not order a new trial, because, it was said, on the evidence a conviction would be improbable if a new trial is ordered. In support Mr. Karpal Singh cited a recent Privy Council judgment in an appeal from Hongkong *Au Pui-kuen* v. *Attorney-General of Hongkong,*[8] in which their Lordships said:

"The strength of the evidence adduced against the accused in the previous trial is clearly one of the factors to be taken into consideration in determining whether or not to order a new trial."

In this connection, Mr. Karpal Singh reminded us that in the instant case their Lordships of the Privy Council had in the reasoning which led to their conclusion held that the regulations were *ultra vires*. Mr. Karpal Singh submitted that this was a "decision ... given in respect of any person in any court" within subsection (3) of section 9 of the Act and that that decision is expressly declared by the subsection to be "lawful and ... valid". Accordingly, Mr. Karpal Singh submitted, this subsection conflicted with subsection (1) of the same section, there is an ambiguity and this ambiguity should be resolved in favour of the accused, this being a criminal matter.

Since then, we have also seen and studied the guidelines laid down by the Privy Council in *Reid* v. *Queen,*[9] the report of which was not available when this appeal was argued.

In our judgment, the proper order to be made here is that the accused shall be retried, as contended by the learned Solicitor-General.

The regulations having been ruled to be *ultra vires*, it is open to Parliament to validate them and, further, to validate them with retrospective effect. With respect, we agree with the following statement of the Indian Supreme Court at page 908 in *Rai Ramkrishna* v. *The State of Bihar*[10]:

"Where the legislature can make a valid law, it may provide not only for the prospective operation of the material provisions of the said law, but it can also provide for the retrospective operation of the said provisions. Similarly, there is no doubt that the legislative power in question includes the subsidiary... power to validate laws which have been found to be invalid. If a law passed by a legislature is struck down by the courts as being invalid for one infirmity or another, it would be competent for the appropriate legislature to cure the said infirmity and pass a validating law so as to make the provisions of the earlier law effective from the date when it was passed."

It is not disputed that the Act in question deals with a federal subject with respect to which the federal Parliament has power to legislate and that under clause (5) of Article 66 of the Constitution Parliament may "make laws with retrospective effect".

In our judgment, the regulations have now been validated and with effect from when they purported to come into force. The regulations struck down by the Privy Council, as already stated, were made by His Majesty in purported exercise of his power under section 2 of the Ordinance. By the long title and the preamble of the Act Parliament has plainly shown its intention to re-enact both the Ordinance and the regulations. The long title reads:

"An Act under Clause (5) of Article 150 of the Federal Constitution to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance, 1969, and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after February 20, 1971, and for the validation of all acts and things done under the said Ordinance or any subsidiary legislation made or purporting to have been made thereunder, and to provide for matters connected therewith."

The preamble of the Act reads as follows: —

"WHEREAS a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong on May 15, 1969, under Article 150 of the Federal Constitution:

AND WHEREAS Parliament by reason of the Emergency considers it necessary to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance, 1969, and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after February 20, 1971, and for the validation of all acts and things done under the said Ordinance or any subsidiary legislation made or purporting to have been made thereunder:

AND WHEREAS it is hereby declared that this Act appears to Parliament to be required by reason of the Emergency:

NOW, THEREFORE, pursuant to Clause (5) of Article 150 of the Federal Constitution BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows."

It is true that, as stated by me at page 71 in *Johnson Tan Han Seng* v. *Public Prosecutor*[11] that though the long title and preamble of an Act are part of a statute they are not operating parts thereof and that their aid can be taken only when there is some doubt about the meaning of the operative parts of the statute. Here there is no need whatsoever to do that, for the language of the operative parts is so clear. Its section 2 is unambiguous and repeats the words of section 2 of the Ordinance — particularly empowering His Majesty to make regulations (like the regulations in question) to ...

"(c) provide for the trial by such courts as may be specified in such regulations, of persons guilty of any offence against the regulations;

(d) make special provisions in respect of procedure... in criminal cases and of the law regulating evidence, proof and... criminal liability."

By subsection (2) of section 1 it is expressly provided that the Act "shall be deemed for all purposes to have come into force on February 20, 1971".

Parliament has also made plain by section 9 of the Act its clear intention to validate with retrospective effect the regulations declared *ultra vires* by the court. Subsection (1) of the section provides:

"Every subsidiary legislation whatsoever made or purporting to have been made under the Emergency (Essential Powers) Ordinance, 1969, (hereinafter in this Act referred to as 'the Ordinance') on or after February 20, 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of this Act and shall be deemed to have come into force from the date on which the said subsidiary legislation came into force or purported to have come into force under the Ordinance, and shall be read with all such modifications as may be necessary to construe such subsidiary legislation as having been made under this Act."

Thus, in our judgment, it is clear that the regulations under which the accused was convicted have been validated and with effect from the date (November 4, 1975) when they purported to have come into force.

It is now convenient to reproduce the words of subsection (3) of section 9 which are as follows:

"Any prosecution instituted, trial conducted, decision or order given, in respect of any person in any court, or any other proceeding whatsoever had, or any other act or thing whatsoever done or omitted to be done, under or by virtue of the Ordinance or any subsidiary legislation whatsoever made or purporting to have been made thereunder is declared lawful and hereby validated."

With respect to Mr. Karpal Singh, we do not think that there is any inconsistency between subsections (1) and (3) of section 9. It is true that the decision of the Privy Council in the instant case that the regulations were *ultra vires* was a "decision given in respect of any person in any court" within the meaning of subsection (3) of section 9, but in our view the effect of the subsection as regards criminal proceedings is limited to validating convictions, sentences and acquittals and other orders in trials conducted in accordance with the regulations before the enactment of the Act, but, because of the explicit language of subsection (1), does not extend to upholding the opinion of the Privy Council formed before the passage of the Act that the regulations were *ultra vires*. To hold otherwise would be to fly in the face of the clear language not only of subsection (1) of section 9, but also of the long title and the preamble.

If we are right, then may we not validate the conviction and sentence of the accused which were upheld by the Federal Court? In our judgment the learned Solicitor-General was right in submitting that we may not. The conviction and sentence have been set aside by His Majesty acting on the advice of the Privy Council and no longer exist, and what we have before us and the only thing that we should consider is the order remitting the case to us to consider whether or not to order a new trial. We are of the opinion that this is a proper case where we should order a new trial and accordingly we so order.

Retrial ordered.

Solicitors: *Karpal Singh & Co.*

YENG HING ENTERPRISE SDN. BHD. v. LIOW SU FAH

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) April 3, 4, and 27, 1979]

[Penang — Federal Court Civil Appeal No. 181 of 1977]

Practice and Procedure — Application to set aside writ and to strike out statement of claim — No reasonable or probable cause of action — Action frivolous and vexatious and an abuse of process of court — Allegation of loans given to purchase shares in company — Non-payment of loan — Whether company could be sued.

The respondent claimed that he had lent moneys to the first defendant and that the moneys have not been repaid by the latter nor by the appellant company nor have they transferred or issued the shares to him. The action was brought both against the first defendant and the appellant company. The appellant company applied for the writ to be set aside and the statement of claim to be struck out on the ground that they disclosed no reasonable or probable cause of action against the appellant company and that they were frivolous and vexatious and an abuse of the process of the court. The learned judge dismissed the application of the appellant company and it appealed to the Federal Court.

Held: (1) the appellant company was not a party to any of the transactions between the respondent and the first defendant and the source of the funds for payment of the shares had nothing to do with the appellant company. In the circumstances the respondent had no reasonable cause of action against the appellant company and the proceedings instituted by him against it are vexatious and frivolous and an abuse of the process of the court and obviously unsustainable;

(2) the statement of claim against the appellant company must be struck out and the action against it dismissed;

(3) the temporary injunction obtained by the respondent against the appellant company became *ipso facto* discharged.

Cases referred to:-

(1) *Cree* v. *Somervail* (1879) 4 App. Cas, 648.
(2) *Re Perkins, Exparte Mexican Santa Barbara Mining Company* (1890) 24 Q.B.D. 613, 616.
(3) *Hawks* v. *McArthur and Others* [1951] 1 All E.R. 22.
(4) *The Jupiter Cigaratte and Tobacco Co. Ltd.* v. *H.C. Henry Soysa* (1971) 74 N.L.R. 241.
(5) *Hongkong Vegetable Oil Company Ltd.* v. *Malim Srinaga Wicker & Ors.* [1978] 2 M.L.J. 13.
(6) *In re Schebsman deceased* [1944] Ch. 83.
(7) *Mackereth* v. *Wigan Coal and Iron Company Ltd.* [1916] 2 Ch. 293.
(8) *Binney* v. *The Ince Hall Coal and Cannel Company* (1866) 35 L.J. (N.S.) Ch. 363.
(9) *Hardoon* v. *Belilios* [1901] A.C. 118.
(10) *The W.H. Randall* [1928] P. 41.
(11) *Hummerstone & Anor.* v. *Leary & Anor.* [1921] 2 K.B. 664.
(12) *The Siskiwa* [1977] 3 W.L.R. 818, 826.
(13) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50, 53.
(14) *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227, 228 & 229.
(15) *Felton* v. *Callis* [1969] 1 Q.B. 200, 218-219.

FEDERAL COURT.

T.R. Hepworth for the appellant.

V.K. Palasuntharam (*S.M. Ratnam* with him) for the respondent.

Cur. Adv. Vult.

Abdoolcader J.:

1. *Preliminary: The issue involved.*

The respondent instituted an action in this matter